Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1965

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LEE M. SEILER,
Petitioner,
VS.
LUCASFILM, LTD., TWENTIETH CENTURY-FOX FILM CORPORATION,
GEORGE W. LUCAS, JR. and JOSEPH E. JOHNSTON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

JOEL E. BOXER
DOROTHY WOLPERT
VINCENT J. MARELLA
BIRD, MARELLA, BOXER, WOLPERT & MATZ
A Professional Corporation
10960 Wilshire Boulevard
Twenty-Fourth Floor
Los Angeles, California 90024
Telephone: (213) 312-0300

JOHN W. KEKER
ROBERT VAN NEST
KEKER & BROCHETT
807 Montgomery Street
San Francisco, California 94133

Attorneys for Respondents Lucasfilm, Ltd., Twentieth Century Fox Film Corporation, George W. Lucas, Jr. and Joseph E. Johnston

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

DESIGNATION OF CORPORATE RELATIONSHIPS

Lucasfilm, Ltd., filing this Brief in Opposition To Petition for *Writ of Certiorari* To The Ninth Circuit Court of Appeals as a respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Lucasfilm, Ltd. is not owned by any parent corporation.

Lucasfilm, Ltd. does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

Lucasfilm, Ltd. does not have any affiliates.

Twentieth Century Fox Film Corporation, filing this Brief In Opposition To Petition For *Writ of Certiorari* To The Ninth Circuit Court Of Appeals as a respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

TCF Holdings, Inc. is the parent of Twentieth Century Fox Film Corporation.

Twentieth Century Fox Film Corporation does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

Twentieth Century Fox Film Corporation does not have any affiliates.

Dated: June 29, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I	
INTRODUCTION	1
II	
STATEMENT OF THE CASE	3
III	
THE APPLICATION OF FEDERAL RULE OF EVIDENCE 1004 TO THE FACTS OF THIS CASE BY THE DISTRICT AND CIRCUIT COURTS CREATES NO CONFLICT WITH ANY OTHER FEDERAL OR STATE COURT OPINION NOR DOES IT RESULT IN ANY ABROGATION OF SEVENTH AMENDMENT RIGHTS	7
IV	
THE CIRCUIT COURT'S INTERPRETATION OF FEDERAL RULE OF EVIDENCE 1001 NEEDS NO REVIEW BY THIS COURT IN THE CONTEXT OF THIS COPYRIGHT CASE BECAUSE IT WAS PERMISSIBLE AND SOUND, CONSISTENT WITH RELEVANT POLICY CONSIDERATIONS AND APPROPRIATELY NARROW	10
V	
THE COPYRIGHT ACT DOES NOT GUARANTEE A JURY TRIAL TO EVERY COPYRIGHT REGISTRANT; MOREOVER THIS CASE PRESENTS SUCH A UNIQUE FACT PATTERN THAT ANY PRECEDENTIAL EFFECT IS LIKELY TO BE NIL	14
CONCLUSION	17
APPENDIX A. Relevant Excerpts From the Record	A-1
APPENDIX B. Court's Order of February 19, 1987	B-1

TABLE OF AUTHORITIES

Cases

Page

Carol Barnhart, Inc., v. Economy Cover Corp., 594 F.Supp. 364 (E.D.N.Y. 1984) *rehearing denied*, 603 F.Supp. 432 (1985); *affirmed* 773 F.2d 411 (2d Cir. 1985) 14, 15

Gila Valley Railroad Company v. Hall, 232 U.S. 94 (1913) 10

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 2

Sylvania Electric Products, Inc. v. Flanagan, 352 F.2d 1005 (1st Cir. 1965) 9

Willhoit v. C.I.R., 308 F.2d 259 (9th Cir. 1962) 9

Constitution

United States Constitution, Seventh Amendment 5, 6, 7, 10, 17

Federal Rules

Federal Rules of Evidence, Rule 104 ..... 3, 6, 7, 10

Federal Rules of Evidence, Rule 1001 ..... 10, 11, 12, 13

Federal Rules of Evidence, Rule 1004 .... 3, 5, 6, 7, 9, 16

Federal Rules of Evidence, Rule 1008 ..... 7, 8, 9

Other

Copyright Act, Sec. 410(c) 15

House Report No. 93-650 13

Rules of Supreme Court, Rule 17 ..... 1, 5, 13

No. 86-1965

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LEE M. SEILER,
Petitioner,
VS.

LUCASFILM, LTD., TWENTIETH CENTURY-FOX FILM CORPORATION,
GEORGE W. LUCAS, JR. and JOSEPH E. JOHNSTON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

I

INTRODUCTION

This case is uniquely inappropriate for review by this Court. Indeed, it is fairly labeled *sui generis*. None of the considerations enunciated in Rule 17, which govern review on *certiorari*, is implicated here. This case does not present an issue of general public importance nor has the opinion of the Ninth Circuit created a lack of uniformity of decision among the circuit courts on any issue of federal law.

As this Court has often noted, the single most important reason for granting a petition for *certiorari* is when the issue sought to be reviewed involves a conflict of decisions among the lower federal courts on a point of federal law, the rationale being to achieve a uniform application of federal law in the intermediate federal court system. Even so, this Court has not been inclined to grant *certiorari* to resolve a conflict in appellate courts over an issue that is unlikely to recur. Thus even where a conflict exists *certiorari* is often denied when it seems likely that the impact of the conflict is narrowly confined and not apt to have continuing future circumstances. This is particularly true when the case presents a unique factual situation.

The petitioner in this case has now manipulated the court system for almost five years, oppressing the unblemished lives of serious creative artists who have been found by two levels of federal courts to be totally without liability to petitioner. Granting a disgruntled plaintiff yet a third forum in which to publish his slanderous allegations of plagiarism is not a proper function of a writ of *certiorari*.

As this Court held in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951):

> "It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony. . . . In such situations we should adhere to the usual rule of non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit different interpretations."

Petitioner's effort to fashion legal issues of sufficient significance for this Court's consideration from express and unchallenged findings of petitioner's "bad faith,"

"false testimony," "fabrications," and "misrepresentations" must be rejected.

II

STATEMENT OF THE CASE

Petitioner's formulations of the "questions presented" by this case are inaccurate because they misrepresent the proceedings below or misstate the questions actually presented to and ruled upon by the circuit court. Respondents will briefly review some salient facts of this case because of additional inaccuracies and misleading statements in the petition for *writ of certiorari*.

First, the district court did *not* "conduct a seven-day bench trial on the central issue of the case." The district court conducted an appropriate evidentiary hearing requested, indeed demanded, *by petitioner*, pursuant to Federal Rules of Evidence ("F.R.E.") 104 and 1004. In fact, the evidentiary hearing had simple origins. Petitioner wished to show "blow-up" comparisons of his works and defendants' works to the jury during opening statement. The district court operated under a rule which disallowed exposure to the jury of any materials until they had been admitted in evidence. This was a longstanding policy of the court which was not specifically imposed for the purposes of this action. [E.R. 487.][1] Petitioner's counsel insisted that the court make evidentiary rulings prior to opening statements because he felt he could not make his opening statement without showing petitioner's reconstructions to the jury. Counsel for petitioner stated:

---

[1]Relevant excerpts from the record including the Reporter's Transcript are reproduced as Appendix A.

> "[I]f they're going to keep coming up, and if we're going to have to deal with them throughout the course of the trial, we'd better deal with them first." [E.R. 705-706; R.T. 6-7.]

In requesting evidentiary rulings, petitioner's counsel did not put forward any of the legal arguments he later attempted to rely on in the circuit court and now wishes to renew before this Court. He never suggested that there would be any impropriety in holding a best evidence rule hearing, that a best evidence rule hearing on admissibility was inconsistent with the Copyright Laws, that the rule was inappropriately applied to petitioner's work in suit, or that, by deciding the admissibility of petitioner's secondary evidence, the district court would be usurping the jury's function. The results of the evidentiary hearing were, quite simply, a finding that petitioner was a liar and that he could not establish the crucial link between the reconstructions he fraudulently deposited with the Copyright Office and his allegedly pre-existing originals — of which he had none.[2]

---

[2]The district court's findings in this case, which the circuit court found were amply supported by the record, are based on strange — even bizarre — facts unlikely to be repeated in the future. In summarizing the 7 days of testimony elicited from 14 witnesses and careful consideration of over 100 exhibits, the court found that "Plaintiff testified falsely as to the destruction of [his] original artwork . . . in a 1979 "flood" underneath his Boonville dome house. Plaintiff purposefully destroyed or withheld in bad faith [his] original artwork. . . . Plaintiff fabricated and misrepresented the nature of secondary evidence for use in this lawsuit." 613 F.Supp. at 1259-60. The court found that plaintiff falsely created a videotape to bolster his misrepresentations and purposefully misrepresented the date of the tape's creation. The Court found plaintiff's testimony (and the testimony of his wife and best friend) "inherently and overwhelmingly unbelievable," "often bordering on the incredible." 613 F.Supp. at 1254, 1255.

The issue presented to the district court and to the circuit court was *never* whether plaintiff's asserted original works "ever existed," but rather whether the originals had been destroyed or withheld in bad faith. This question was clearly for the court pursuant to F.R.E. 1004. It is only by misstating the nature of respondents' best evidence objection that petitioner can argue that the wrong rule was applied.

Petitioner's disingenuous assertions, designed to alarm the circuit court, and now this Court, by raising the specter of vitiation of Seventh Amendment protections, are unavailing. More important, petitioner's characterizations of the circuit court's opinion are simply inaccurate. Petitioner's effort to clothe his well-documented fraud in a cloak of legal principle is understandable. But the truth is that this case presented a unique *factual* situation created by petitioner's bold abuse of the Copyright Office and the courts. Based on the unusual facts before it, the opinion of the circuit court was appropriately narrow and the reach of this case should prove concomitantly restricted. For this reason, alone, there is no question of law that justifies the grant of a *writ of certiorari* here.[3]

Petitioner has wholly failed to sustain his burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Ninth Circuit decided a federal question in a way to conflict with applicable decisions of

---

[3]The circuit court recognized the narrow and uncontroversial impact of its opinion in denying petitioner's motion for rehearing and rejecting the suggestion for a rehearing *en banc*. The Court's Order of February 19, 1987 is reproduced as Appendix B.

this Court or of another Court of Appeals in the same matter.

With unwarranted melodrama petitioner ominously warns that the circuit court has "blazed" a path for "turning the Seventh Amendment into an "impotent exhortation." [Petition at p. 9.] Elsewhere, petitioner bemoans the absence of any discussion of the Seventh Amendment in the circuit court's opinion, conveniently ignoring the obvious reason for that absence: the case presents no Seventh Amendment issue. The circuit court quite properly, and traditionally, applied the Federal Rules of Evidence (F.R.E. 104 and F.R.E. 1004) in precisely the manner envisioned by the drafters of those rules, who clearly did not intend to oust the trial judge of his time-honored and necessary role of ruling on preliminary questions of fact affecting admissibility.

While truly it can be said with justification that each case is unique, this case must be labelled (albeit ungrammatically) "more unique" than most. Petitioner presented himself as the author of a once-existing, once-published work whose *only* "exemplar" was a reconstruction deposited with the Copyright Office years after it was allegedly created, and, most important, *after* the allegedly infringing work of defendant was exhibited.

Little wonder that petitioner sought in the district and circuit courts to invest his unique deposit copy with such enormous legal and evidentiary significance. Petitioner's fraudulently obtained copyright certificate was a predicate for suit, but he sued on a work that he does not have and that does not now exist and his "planted," after-the-fact reconstructions were properly rejected by both the district court and the circuit court as an improper foundation for a copyright infringement action. Disallowing their use for that purpose can, by no stretch of the

imagination, be deemed a distortion or violation of the Copyright Act, the Federal Rules of Evidence or the Seventh Amendment.

III

THE APPLICATION OF FEDERAL RULE OF EVIDENCE 1004 TO THE FACTS OF THIS CASE BY THE DISTRICT AND CIRCUIT COURTS CREATES NO CONFLICT WITH ANY OTHER FEDERAL OR STATE COURT OPINION NOR DOES IT RESULT IN ANY ABROGATION OF SEVENTH AMENDMENT RIGHTS

Petitioner admitted in his petition for rehearing, after the circuit court issued its opinion, that the "court/jury allocation issue was extensively briefed in [the circuit] court, and further developed at the oral argument." Thus, contrary to the argument he now makes to this Court, the circuit court was well aware of, and squarely confronted, the issue of petitioner's jury entitlement, *vel non*, in this case. The circuit court held that F.R.E. 1004 was applicable to this case, not, as petitioner continues to insist, F.R.E. 1008. The circuit court specifically adverted to F.R.E. 1008 in the context of criticizing petitioner's argument that it, rather than F.R.E. 1004, was the applicable rule.

F.R.E. 1008 creates an exception to the rule that questions of admissibility are ordinarily for the court to determine in accordance with the provisions of F.R.E. 104. That exception comes into play when an issue is raised:

> "(a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c)

whether other evidence of contents correctly reflects the contents, . . ." [F.R.E. 1008.]

As the circuit court noted:

> "Lucas conceded the originals existed and Seiler conceded the items he sought to introduce were not the originals. Hence, as subsections (a) and (b) are not in issue, Seiler is arguing that 1008(c) requires that the case be submitted to the jury." 808 F.2d at 1321, fn. 2.

The opinion went on:

> "Seiler's position confuses admissibility of the reconstructions with the weight, if any, the trier of fact should give them, after the judge has ruled that they are admissible. Rule 1008 states, in essence, that when the *admissibility* of evidence other than the original depends upon the fulfillment of a condition of fact, the trial judge generally makes the determination of that condition of fact . . . In the instant case, *the condition of fact which Seiler needed to prove was that the originals were not lost or destroyed in bad faith.* Had he been able to prove this, his reconstructions would have been admissible and then their accuracy would have been a question for the jury. In sum, since admissibility of the reconstructions was dependent upon finding that the originals were not lost or destroyed in bad faith, the trial judge properly held the hearing to determine their admissibility." (Emphasis added.) 808 F.2d at 1321.

Concerning the specific condition of fact which petitioner needed to prove, the circuit court held that the district court's finding that "Seiler testified falsely, purposefully destroyed or withheld in bad faith the originals, and fabricated and misrepresented the nature of his

reconstructions" was "amply supported by the record." 808 F.2d at 1320.

Respondents did not, either at the district court or circuit court, argue that petitioner's original works did not exist. In fact, respondents contend that the originals did exist at some time, but that they were created after petitioner saw respondents' work and were intentionally withheld or destroyed to conceal the true date and manner of their creation. As the district court found, the fact that originals did exist at some time was "an inescapable conclusion given the second and third generation copies sought to be offered by plaintiff." [E.R. 517]. Where the existence of the originals is not at issue, but their bad faith loss or destruction is, both F.R.E. 1004 and 1008 provide that the determination of whether the proponent of the evidence has established that all the originals were lost or destroyed without bad faith, is a question for the court.

Contrary to petitioner's unsupported argument that where proffered secondary evidence relates to documents crucial to plaintiff's claim the court should abdicate its responsibility in favor of the jury, when the missing original documents in dispute are the "very foundation of the claim," more strictness in proof is required than where the writings are only involved collaterally. *Sylvania Electric Products, Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965) ["[U]nder the Best Evidence Rule, in order to permit proof by secondary evidence of the allegedly lost or otherwise unavailable original writing, the trial judge must make preliminary findings that the original had become unavailable, otherwise than through the fault of the proponent of the testimony. . . ."]; *Willhoit v. C.I.R.*, 308 F.2d 259 (9th Cir. 1962).

Questions of admissibility of evidence have always been for the determination of the trial court judge. As this Court said in *Gila Valley Railroad Company v. Hall*, 232 U.S. 94 (1913):

> "This is so whether its admission depend upon matter of law or upon matter of fact. And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal for error if it be fairly supported by the evidence, as it is in the case before us [citations omitted]." 232 U.S. at 103.

In our system, the judge has always determined what witnesses and what evidence the jury shall hear. F.R.E. 104. If the only evidence that a plaintiff can marshall is inadmissible, he will have no viable action. Disallowing him to present inadmissible evidence to a jury does not abrogate any Seventh Amendment rights.

Petitioner's effort to alarm this Court at a potential pervasive impact of the circuit court's holding is mere rhetoric. The Federal Rules of Evidence clearly allocate certain decisions to the judge and others to the jury. The circuit court's opinion has no impact on that well-established allocation.

IV

THE CIRCUIT COURT'S INTERPRETATION OF FEDERAL RULE OF EVIDENCE 1001 NEEDS NO REVIEW BY THIS COURT IN THE CONTEXT OF THIS COPYRIGHT CASE BECAUSE IT WAS PERMISSIBLE AND SOUND, CONSISTENT WITH RELEVANT POLICY CONSIDERATIONS AND APPROPRIATELY NARROW

Although petitioner insists that the circuit court "ignored" Congressional intent when it interpreted F.R.E. 1001 to include petitioner's works in this case, once again

reference to the court's actual opinion establishes otherwise. [808 F.2d at 1318-1320.] Indeed, the court itself engaged in a substantial textual and historical analysis to support its holding that "Seiler's drawings were 'writings' within the meaning of Rule 1001(a)." [808 F.2d at 1318-19.] The court quotes from the advisory committee notes which point out that the rule is "essentially" — *not exclusively* — related to writings.

In the petition, immediately after discussing the advisory committee's notes and referring to them, there is a quotation which refers to the advisory committee and presumes to divine a "deliberate choice" of the committee with respect to expansion of the definition. However, petitioner's quote is *not* from the advisory committee's notes; it is from an evidence treatise which, as the circuit court pointed out, "seems more historical than rigorously analytic," and renders an opinion "without support from any cases that the rule is limited to words and figures." [808 F.2d 1318.] There are, in fact, no such cases.

As the circuit court also noted, the copyright laws give legal protection to the objective manifestations of the creative mind, just as the law of contracts protects other legally cognizable rights. The essence of an infringement action implicates proof of the substantial similarity between the plaintiff's work and the defendant's.

> "There can be no proof of 'substantial similarity' and thus of copyright infringement unless Seiler's works are juxtaposed with Lucas' and their contents compared. Since the contents are material and must be proved, Seiler must either produce the original or show that it is unavailable through no fault of his own. Rule 1004(1). This he could not do.

> "The facts of this case implicate the very concerns that justify the best evidence rule. . . . In short, Seiler claims that the movie infringed his originals, yet he has no proof of those originals.
>
> "The dangers of fraud in this situation are clear. The rule would ensure that proof of the infringement claim consists of the works alleged to be infringed. Otherwise, 'reconstructions' which might have no resemblance to the purported original would suffice as proof for infringement of the original. Furthermore, application of the rule here defers to the rule's special concern for the contents of writings. Seiler's claim depends on the content of the originals, and the rule would exclude reconstituted proof of the originals' content. Under the circumstances here, no "reconstruction" can substitute for the original." 808 F.2d at 1319.

Additionally, petitioner's works included many words and numbers and were created by photographic and reprographic techniques. Indeed, petitioner's works are an example of the "modern developments" envisioned by the drafters of the rule. Although one focus of the case was, as the circuit court observed, on "drawings," they were merely *part* of the works at issue allegedly copyrighted by petitioner who did not in his applications to the Copyright Office describe them as "artworks." None is simply a drawing and each was created by photography and substantially comprised of words and numbers.

The circuit court, properly interpreting F.R.E. 1001 held:

> "A creative literary work, which is artwork, and a photograph whose contents are sought to be proved, as in copyright, defamation, or invasion of privacy,

> are both covered by the best evidence rule. See *McCormick,* § 232 at 706 n. 9; Advisory Committee's Note to Rule 1002; 5 Louisell & Mueller, § 550 at 285 n. 27. We would be inconsistent to apply the rule to artwork which is literary or photographic but not to artwork of other forms. Furthermore, blueprints, engineering drawings, architectural designs may all lack words or numbers yet still be capable of copyright and susceptible to fraudulent alteration. In short, Seiler's argument would have us restrict the definitions of Rule 1001(1) to 'words' and 'numbers' but ignore 'or their equivalent.' We will not do so in the circumstances of this case." 808 F.2d at 1320.

Not only is the circuit court's interpretation warranted in light of the policy issues which underlie F.R.E. 1001 (petitioner cannot and does not suggest any policy reason to exclude his type of work from the operation of the rule), but the most recent developments presage that its holding would be endorsed by other circuit courts. In House Report No. 93-650, the committee on the judiciary amended F.R.E. 1001 expressly to include "video tapes" in the definition of "photographs." Since video tapes as a rule are comprised of, or at least include, visual images, as well as words and numbers, the sterile distinction urged by petitioner (without any case or policy support) appears unlikely to find favor. Most important, for the purposes of petitioner's *writ of certiorari,* none of the Rule 17 criteria is met with respect to this issue at this time.

V

THE COPYRIGHT ACT DOES NOT GUARANTEE A JURY TRIAL TO EVERY COPYRIGHT REGISTRANT; MOREOVER THIS CASE PRESENTS SUCH A UNIQUE FACT PATTERN THAT ANY PRECEDENTIAL EFFECT IS LIKELY TO BE NIL

The most cursory review of the facts of this case will serve to convince this Court that it is highly improbable that a case like this one will be repeated or that the circuit court opinion resolving it will have wide — if indeed any — future applicability. Rare indeed is (or will be) the copyright case in which a plaintiff does not have a copy of his work. The reason that the parties to this action were unable to uncover a single copyright opinion discussing the best evidence rule does not mean, as petitioner would contend, that the rule has no applicability in copyright cases. Rather, it is that the overwhelming majority of plaintiffs who come into court on a copyright claim have a copy of their work as published with proper notice, can point to the existence of that work in the hands of independent witnesses, and can establish by admissible evidence the publication with notice of their work prior to, *and before their own access to,* the defendant's allegedly infringing work. None of those foundational elements was present in this case. The best explanation for why there are no cases elucidating the issue raised by petitioner is that few plaintiffs would be so emboldened as to tread such a perilous path.

Nothing in § 410 of the Copyright Act compels a jury trial in a setting such as is presented by this action. Even where the presumptions afforded by the Copyright Act are available to an infringement plaintiff, evidence to rebut the presumptions can be offered by defendants to the court. *See, e.g. Carol Barnhart, Inc. v. Economy Cover*

Corp., 594 F.Supp. 364 (E.D.N.Y. 1984) *rehearing denied*, 603 F.Supp. 432 (1985); *affirmed* 773 F.2d 411 (2d Cir. 1985). Although petitioner purports to divine a "deliberate policy choice" in § 410(c) that copyright certificates must at least reach the trier of fact, such divination appears to have no basis in the statute itself, in the history of the statute or in the case law. Indeed, such a suggestion would make summary judgment unavailable to a defendant in a copyright action. It is apparent that, however generous the presumptions afforded a copyright plaintiff by the Copyright Act, it was not designed to encourage and facilitate fraud. As the circuit court pointed out:

> "The Copyright Act does not contemplate the copyrighting of a non-existent original on the basis of a tendered reconstruction. Section 408 specifies the types of material that must be deposited along with an application for a certificate. The permissible materials include bona fide copies of the original work only; there is no mention of 'reconstructions.' If it were otherwise, the possibilities for fraud would be limitless." 808 F.2d at 1322.

Further, § 410(c) merely provides that the certificate of registration shall constitute *prima facie* evidence of the validity of facts stated in the copyright certificate. When, as here, a reconstruction was attached to the certificate, it was no abuse of the court's discretion to conduct a pretrial hearing which resulted in the finding that petitioner had lost or destroyed the originals in bad faith. That finding overcomes any presumption afforded the attachment to the certificate by virtue of § 410(c).

Of central significance, as the circuit court observed, was the fact that neither the certificates nor their attachment purported to speak on the ultimate issue of whether

the reconstructions were true to the supposed originals. That question was preliminary and for the court pursuant to F.R.E. 1004. "Prima facie evidence of statements in the certificate" were "irrelevant until that proof had been made." [808 F.2d at 1322.]

While admittedly petitioner in this case sought to make novel (and perhaps unprecedented) use of the Copyright Act, the circuit court's appropriately narrow holding is neither novel, radical, nor likely to be of widespread precedential application. It neither threatens fundamental rights nor does it find itself in disagreement with any published opinion of a circuit court of the land or of this Court.

CONCLUSION

Petitioner's description of this case as one affecting "ultimately every federal litigant entitled to invoke the Seventh Amendment," is ludicrous. It would be humorous were it not such a gross distortion of reality. The reality is that after years of effort and expense defendants have finally defeated a suit that was frivolous and fraudulent in the first place. The petition has no greater merit and should be denied.

DATED: July 10, 1987.

Respectfully submitted,

JOEL E. BOXER
DOROTHY WOLPERT
VINCENT J. MARELLA
BIRD, MARELLA, BOXER,
WOLPERT & MATZ
A Professional Corporation

JOHN W. KEKER
ROBERT VAN NEST
KEKER & BROCKETT

By: VINCENT J. MARELLA
Attorneys for Respondents Lucasfilm, Ltd., Twentieth Century Fox Film Corporation, George W. Lucas, Jr. and *Joseph E. Johnston*

APPENDIX A

EXCERPT FROM PLAINTIFF'S MEMORANDUM RE BEST EVIDENCE HEARING [E.R. 487]

10. In addition, on the basis of a purported Best Evidence objection by defendants, the Court ruled that plaintiff's counsel could not use any exhibits in opening statement. This ruling was made without an offer of proof by defendants, but based only on a claim that the documents had been fraudulently created. In spite of plaintiff's offer of proof in compliance with Fed.R.Evid. 1004, the Court sustained this objection.

11. On Tuesday morning, September 11, 1984, plaintiff's counsel moved for mistrial, based on many grounds, including the ruling precluding plaintiff's counsel from showing exhibits to the jury in opening statement. Plaintiff's counsel pointed out to the Court that this ruling had effectively eliminated plaintiff's ability to make an opening statement that would inform the jury of what was involved in the case, and effectively dictated to plaintiff the order in which he offered evidence.

12. Plaintiff's counsel argued that the Court should have demanded of defendants some offer of proof, and, if the Court had any questions based on the offer of proof, the Court should have ordered an evidentiary hearing to resolve the "Best Evidence" issue before the trial started.

13. The Court acquiesced and ordered a "Best Evidence" hearing to determine if the plaintiff should be permitted to use originals, duplicates and secondary evidence of the original depiction of his Walkers.

14. While a "Best Evidence Hearing" should address the issues set forth in Fed.R.Evid. 1004, it soon became apparent that defendants did not have a Best Evidence objection to the . . .

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 10, 1984 [E.R. 705-706]

. . . do with them; and I think some — at least some that you'll agree on.

THE COURT: And what . . . is the list your fifteen-page list?

MR. BOWLES: Fifteen-item list, your Honor?

THE COURT: Yes, fifteen-item list.

MR. BOWLES: Yes, Sir.

MR. KEKER: Well, that's his — ours is more fundamental. I mean, ours — and I really ought to let Mr. Van Nest address some of these. But some of the objections will go to the authenticity and evidentiary value of certain exhibits that I know Mr. Bowles wants to show the jury right away.

And it is our . . . it is our strong belief that by the repetition of inauthentic evidence there's a danger of miscarriage of justice. And we want to be heard on that originally.

MR. BOWLES: What actually has happened, your Honor, in our view, is that by making this proposal what we ended up receiving back from them was an effort, I think, to reargue their late motions that they submitted to the court on Wednesday or Thursday.

As the Court looks over those items, they basically are the same items that they listed in their late motion to the Court that the Court rejected. But if they're going to keep coming up, and if we're going to have to deal with them throughout the course of trial, we'd better deal with them first.

THE COURT: All right. I'll follow the suggestion of counsel. And we'll select the jury, and then recess for an appropriate time.

Now, the question of the evidentiary hearing with respect to the best evidence rule. The case is over if the Court grants the motion made on the basis of the plaintiff's opening statement. And that argument really is the argument on the best evidence rule.

Am I correct about that?

MR. KEKER: I — I'm not sure which motion you're referring to. The motion with respect to George Lucas makes the case over as to him, but not as to the other three defendants. That motion simply will be that there has been and is not now any evidence that George Lucas did any copying, and there's no derivative theory of liability that's been put forth, so he shouldn't even be sitting here.

Their theory at best is that Joe Johnston did something wrong, and Lucasfilm and Twentieth Century is derivatively liable.

So — so we think that is completely separate from the best evidence rule. The best evidence problem is that we challenge the fact that the originals, of which copies are being produced, copies of copies of copies, ever existed at an . . .

EXCERPT FROM USDC OPINION
FILED 10/16/84 [E.R. 517]

. . . originals did exist at some time (an inescapable conclusion given the second and third generation copies sought to be offered by plaintiff), but that the originals were created following plaintiff's access to ESB materials, and have been intentionally withheld or destroyed to conceal the true date of their creation. Therefore, defendants characterize the issue as not whether the originals ever existed, but whether the originals have been lost or destroyed in bad faith, a proper preliminary determination for the Court under Rules 104(a), 1004, and 1008.

The Court finds defendant's characterization to be the correct one. First, the originals must have existed at some time so that plaintiff could create the copies he seeks to offer into evidence. This is clearly not a case in which plaintiff is seeking to offer secondary evidence in the form of oral testimony and the like, in which case a true question as to the existence of the original may be posed. Rather, defendants' contention is that the originals existed and were destroyed in bad faith, or still exist and are being intentionally withheld.

Second, whether the originals were created prior to plaintiff's access to ESB materials or following that access is of little consequence when considered in light of the purpose of the "best evidence" rule. Although the "best evidence" rule is designed to facilitate the use of secondary evidence when there is a need to allow that evidence to be used in lieu of the original, the rule is also designed to keep out secondary evidence when its admission would be contrary to the furtherance of justice. A copy is always liable to error, whereas this contingency wholly disappears when the original is produced. 4 Wigmore on . . .

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE M. SEILER,
Plaintiff-Appellant,
v.
LUCASFILM, LTD., INDUSTRIAL LIGHT AND MAGIC, TWENTIETH CENTURY-FOX FILM CORPORATION, GEORGE LUCAS, JR., and JOSEPH E. JOHNSTON,
Defendants-Appellees.

CA No. 85-1955
DC No. CV-83-696-WHO
(Northern California)

ORDER

FILED: Feb. 17, 1987
Before: FARRIS, and BOOCHEVER, Circuit Judges, and KEEP,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc and Judges Boochever and Keep recommend rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 10, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "Lee M. Seiler vs. Lucasfilm Ltd., Twentieth Century-Fox Film Corporation" in the United States Supreme Court, October Term 1986, No. 86-1965:

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Elliott L. Bien
Paul H. Cyril
Bronson, Bronson & McKinnon
555 California Street
Suite 3400
San Francisco, CA 94104

John R. Murtha
1253 Larch Avenue
Moraga, CA 94556

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 10, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA